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Supreme Court of the United States

OCTOBER TERM, 1922

NO. [redacted] 142

JOHN SWENDIG, JAMES W. MILLER, REMIGUS GRAB, ET AL., *Appellants*,

vs.

THE WASHINGTON WATER POWER COMPANY, *Appellee*.

Appeal From the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR APPELLANTS

JAMES F. AILSHIE,
Attorney and Solicitor for Appellants.

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STATEMENT OF THE CASE

There is no dispute as to the essential facts of this case. Prior to April 15, 1902, appellee filed an application with the Department of the Interior for authority to construct a telephone line across the Coeur d'Alene Indian Reservation, in the State of Idaho, and authority

was granted by the Secretary on April 15, 1902. This application was made and the authority granted pursuant to the Act of Congress, approved March 3, 1901. (31 Statutes at Large 1083.) (Tr. 2.) The telephone line was constructed under the authority so granted across the lands now owned by appellants.

Prior to July 7, 1902, appellee filed an application with the Department of the Interior for a permit to construct and maintain an electric power transmission line over said Reservation, which permit was granted by the Secretary on July 7, 1902, and the line crossed, among other lands, the lands now belonging to appellants. This application was made and permit granted under authority of the Act of Congress, approved February 15, 1901 (31 Statutes at Large 790.) (Tr. 3.)

Under the above mentioned authority from the Secretary of the Interior and during the year 1903 appellee constructed an electric power transmission line over and across said Reservation and the lands of appellants. About the same time appellee also constructed a telephone line across the Reservation, which latter line simply consisted of wires placed upon the poles of the power transmission line, and since that time appellee has continually maintained and operated both lines and also a patrol road along the same. (Tr. 4.) Although the telephone line has been constructed since 1903, it has never been used by anyone or for any purpose except by appellee in connection with and as an accessory to the power transmission line, and the same was constructed

only for that purpose.

In 1910 the Coeur d'Alene Indian Reservation was thrown open to settlement by Proclamation of the President, under and pursuant to the Act of Congress of June 21, 1906. (34 Stat. L. 335.) On or about May 2, 1910, and after the opening of the Reservation, appellant, John Swendig, made a homestead filing upon the land described as the Northeast Quarter of Section 26, Township 47 North, Range 3, West of Boise Meridian, Idaho, and thereafter made final proof and on the 13th day of October, 1913, received a patent from the United States for such land. (Tr. 5.) On or about the 7th day of May, 1910, appellant, Remigus Grab, made a homestead filing upon the land described as the Northeast Quarter of Section 24, Township 47 North, Range 3, West of Boise Meridian, Idaho, and thereafter made final proof and on the 24th day of September, 1912, received a patent from the United States to said land. (Tr. 9.) On or about the 4th day of May, 1910, appellant, James W. Miller, made a homestead filing upon the land described as the North Half of the Southwest Quarter and the East Half of the Northwest Quarter of Section 26, Township 47 North, Range 3, West of Boise Meridian, Idaho, and thereafter made final proof and on the 23rd day of January, 1914, received a patent from the United States to the above described land. (Tr. 8.) On or about the 22nd day of December, 1910, appellant, Anthony Kerr, made a homestead filing upon the land described as Lot 2 and the Southeast Quarter of the Northwest Quarter

and the Southwest Quarter of the Northeast Quarter and the Northwest Quarter of the Southeast Quarter of Section 19, Township 47 North, Range 2, West of Boise Meridian, Idaho, and thereafter made final proof and on the 15th day of October, 1918, received a patent from the United States for this land. (Tr. 9-10.)

Each patent to the above described land is absolute on its face and makes no reservation whatever of appellee's pretended right of way, and under these absolute conveyances each appellant has at all times objected to the use of said right of way across his land on the ground that appellee has no permit or right to operate and maintain said lines there across.

Appellee brought separate action against each appellant for the purpose of securing an injunction and prays the court as follows:

> "That this Court may issue its injunction perpetually enjoining and restraining the said defendant and all persons acting under his authority or pretending so to act, and all successors in interest of said defendant, from interfering with this plaintiff in operating and maintaining the said electric power transmission line and said telephone line and said patrol road over and across" the respective land of each defendant, "and from passing along and over the said patrol road."

The appellants each filed their motions in the trial court to dismiss the actions, on the ground that the complaint fails to state facts sufficient to constitute a cause of action. (Tr. 21-22.) These motions were overruled by the trial court (Tr. 22-23), and the decision of the

trial court was based upon the case of Washington Water Power Co vs. Harbaugh (253 Fed. 681), a previous decision of the same court. The case went to trial, and documentary evidence and oral testimony was introduced, and the court thereupon entered a decree in favor of appellee as prayed for, and "perpetually enjoined and restrained (defendants) from interfering with the plaintiff in the operation and maintenance of the said electric power line," etc. (Tr. 34-37.) Defendants thereupon prosecuted an appeal from the judgment to the Circuit Court of Appeals for the Ninth Circuit. The Circuit Court of appeals affirmed the judgment of the trial court. See opinion in 281 Fed. 900. For the convenience of the court we are printing a copy of the opinion of the Court of Appeals as an appendix to this brief.

SPECIFICATION OF ERRORS.

In stating our specifications of errors here we will simply endeavor to condense their statement as contained in our assignment of errors filed with the clerk on taking this appeal, and disclosed at pages 44 to 46, inclusive, of the transcript in this court.

I.

The court erred in holding and decreeing that the permit granted to appellee for a right of way across the lands of appellants, and each of them, for the construction and maintenance of an electric transmission line is a valid and subsisting permit in force and effect since the issuance of patent to appellants; and erred in holding and decreeing that the title of these appellants, and each

of them, to the lands described in their patents and the decree herein is subject and subservient to any rights of appellee to maintain a power transmission line across the same.

II.

The court erred in holding and decreeing that the permit granted to appellee under the provisions of the Act of Congress of Feb. 15, 1901 (31 Stat. L. 790) was not revoked by the subsequent issuance of unqualified patents to these appellants; and erred in holding and decreeing that the title taken by appellants under their patent from the government was subject to and impressed with a superior right, easement or license granted to appellee by the Secretary of the Interior, prior to the entry of the said lands by appellants and which said permit was granted under the provisions of the Act of Feb. 15, 1901 (31 Stat. L. 790).

III.

The court erred in not holding that the permit granted to the appellee under the Act of Feb. 15, 1901 (31 Stat. L. 790) was a mere license revocable at will and that the same was revoked ipso facto by the issuance of patents to homesteaders thereon, and the court erred in not holding in conformity with the express terms of said Act of Feb. 15, 1901 (31 Stat. L. 790) that such permit "shall not be held to confer any right, or easement, or interest in, to or over any public land, reservation or park."

IV.

The court erred in not holding and decreeing that paragraph 11 of the regulations of the Land Department (31 L. D. 17), which was in force at the time that appellants entered the lands subsequently patented to them as a part of the law in force at the time, and notice to them of the construction the Land Department then placed upon the provisions of the Act of Feb. 15, 1901 (31 Stat. L. 790), to the effect that "The final disposal by the United States of any tract traversed by the permitted right of way is of itself, without further act on the part of the Department, a revocation of the permission so far as it effects that tract, and any permission granted hereunder is also subject to such further and future regulations as may be adopted by the Department." (31 L. D. 17.)

V.

The court erred in holding and decreeing that appellee is the owner of a right of way and easement for a telephone line upon and across the respective lands of these appellants; and erred in holding and decreeing that appellee is entitled to maintain a roadway along the power transmission line described in said decree.

ARGUMENT.

I.

UNDER ACT OF CONGRESS APPELLEE ACQUIRED NO EASEMENT, INTEREST OR TITLE, BUT ONLY A LICENSE.

The language used in the Act of Congress of Feb-

ruary 15, 1901, under which appellee received a permit to operate and maintain its electric power transmission line, is unambiguous and would seem to admit of but one construction. It clearly states that the Secretary of Interior cannot grant, and a grantee cannot acquire, *any interest* whatever in the land across which the grantee acquires permission to maintain and operate electric power and transmission lines.

The statute involved reads in part as follows:

> "That the Secretary of the Interior be, and hereby is, authorized and empowered, *under general regulations to be fixed by him*, to permit the use of rights of way through the public lands, forests and other reservations * * * for electrical plants, poles, and lines for the generation and distribution of electrical power * * * to the extent of the ground occupied by such * * * electrical or other works permitted hereunder * * * And provided further, that any permission given by the Secretary of the Interior under the provisions of this Act may be revoked by him or his successor in his discretion, and *shall not be held to confer any right, or easement, or interest in, to or over any public land, reservation or park.*" (31 Stat. at L. 790.)

As the grantee acquired no *"right,* or *easement,* or *interest in, to or over"* the land in question, and still had a right under the permit granted by the Secretary of the Interior, to *operate and maintain* an electric power and transmission line across the Coeur d'Alene Indian Reservation, then the permit, revocable at the option and in the discretion of the Secretary of the Interior, could be nothing greater than a mere *revocable license.* Appellee does not claim that it has any *easement* over the land in

question, but does claim that it has the *right to "operate and maintain said lines under the permit heretofore mentioned,"* under the authority of the Land Department of the United States. In other words, the appellee claims that the permit, granted to it by the Secretary of the Interior, to operate and maintain its transmission line across the Coeur d'Alene Indian Reservation, is *still existing and operative* and that the authority gives it a *right to continue to operate* and maintain this transmission line over appellants' lands.

Now, as the appellee never had anything more than a mere revocable license to operate and maintain its transmission line across the Coeur d'Alene Indian Reservation, its present rights must be construed and must depend upon the same construction as the rights of any other individual operating under a revocable license, and its rights may be extinguished in the same manner and under the same condition as those of a *licensee under a private individual.* The appellee does not maintain, nor could it successfully maintain that the United States could not have revoked its permit at any time prior to issuing patents to appellants. The Land Department specifically reserved the right to cut off appellee's permit or license at its option.

Hence if the United States could revoke this permit or license at its option, then clearly any act on the part of the United States, which shows an intent to revoke such permit, or *which is inconsistent with the continued existence thereof,* must ipso facto revoke appellee's license

to operate and maintain its transmission line.

Evidently any act of the government which withdraws the lands from the category of *"public land, reservation or park"* terminates the permit, since such permit can only be granted over *such lands.*

There is, therefore, one decisive question involved in this case, and that is:

Does the subsequent conveyance of land by the United States by a patent absolute on its face, ipso facto, revoke a permit issued by the Secretary of the Interior, under the authority of the Act of Feb. 15, 1901, *for the construction of a power transmission line over such land at a time when it was in an Indian Reservation?*

It has apparently been admitted by all concerned thus far in the case that any permit issued under the Act of February 15, 1901, is a mere *revocable license.*

This Act authorizes the Secretary to *permit a right of way* through the *public lands* of the United States for certain purposes. This statute does not deal with the subject of *transferring title* to the settlers or reserving rights in the patents issued to them, and does not deal or purport to deal with the lands after they have been earned and are passing by patent to individuals. It clearly refers alone to a mere license (permit) to cross the public lands *so long as they are public lands.*

This is evidenced by the further language of the act which expressly provides that *any permission* given by

the Secretary under the provisions of this Act may be revoked by him in his discretion and shall not be held to confer any *right* or *easement* in, to or over the *public lands*. Does this statute, giving a mere revocable permit over the *public lands*, which creates no right or easement, have anything to do with, or is it any kith or kin either in law or fact, to an exception in a patent conveying land to a private party? The answer seems obvious.

II.

ISSUANCE OF A PATENT REVOKES A LICENSE.

It is an elementary principle of law that in order for a license to exist the licensor must have some right to or interest in the thing upon which the license is to operate, and that when such right or interest of the licensor is extinguished, so also is the license extinguished. It appears to have been uniformly held that an absolute conveyance of land revokes any license to the use thereof.

In the case of De Haro vs. U. S., 5 Wall. 599 (18 L. E. 681), this court lays down the rule in the following language:

> "There is a clear distinction between the effect of a license to enter land, uncoupled with an interest and a grant. A grant passes some estate of greater or less degree, must be in writing, and is irrevocable, unless it contains words of revocation; whereas a license is a personal privilege, can be conferred by parol or in writing, conveys no estate or interest, and is revocable at the pleasure of the party making it. There are also other incidents attaching to a license. It is an authority to do a lawful act, which, without it, would be unlawful, and while it remains

unrevoked is a justification for the acts which it authorizes to be done. It ceases with the death of either party and cannot be transferred or alienated by the licensee, because it is a personal matter, and *is limited to the original parties to it. A sale of the lands by the owner instantly works its revocation, and in no sense is it property descendible to heirs. These are familiar and well established principles of law, hardly requiring a citation of authorities for their vindication;* but if they are needed, they will be found collected in the notes to 2d Hare & Wallace's American Leading Cases, commencing on page 376. We are not aware of any difference between the civil and common law on this subject.'

The author of the text in 18 Am. & Eng. Encyc. of Law, at page 1141, states the rule as follows:

> "As a license is terminated by *any act of the licensor which shows an intention to revoke it, a conveyance by the licensor of some interest in the land inconsistent with the continued enjoyment of the license operates as a revocation* even if the license was granted upon a consideration."

A great many authorities could be cited upon this question, all holding as the above, but as was said in the De Haro case, "These are familiar and well established principles of law, hardly requiring a citation of authorities for their vindication."

The very fact that Congress authorized the granting of the permit or license here involved, and also left it within the discretion of the Secretary to grant or refuse to grant the permit, very strongly indicates the thought of Congress in attaching this condition that it might not be wise or expedient to grant such authority to some

companies or individuals, whereas he might safely grant such permit to others. In other words, the responsibility, integrity and financial standing of the applicant might be almost controlling, and at the same time the assignee or grantee of some permittee might not have such standing.

Great Falls Waterworks Co. vs. Gr. Northern Ry. Co., 54 Pac. 963-966.
Minneapolis W. Ry. Co. vs. Minnesota & St. L. Ry. Co., 59 N. W. 983.
Hodgkins vs. Farrington, 22 N. E. 73.
Jones on Easements, Sec. 69.
Banks vs. Brooks, 169 N. W. 920; 172 N. W. 582.
25 Cyc. 640.

It is also established by an unbroken line of authorities that when a patent, absolute upon its face, has been issued by the Land Department and delivered and accepted by the patentee, the title of the United States goes with it and all right to control the title or land or to decide on the right to the title has passed from the Land Office and from the Executive Department of the Government.

22 R. C. L., page 275, par, 37.
United States vs. Carl Schurz, 12 Otto 378; 26 U. S. (L. E.) 167.
Moore vs. Robbins, 6 Otto 530; 24 U. S. (L. E.) 848.
Iron Silver Mining Company vs. Campbell, 135 U. S. 286; 34 U. S. (L. E.) 155.
Stone vs. United States, 2 Wall. 525; 17 U. S. (L. E.) 765.
In United States vs. Schurz (Supra) the court says:

"From the very nature of the functions performed by these officers (officers of the Land Department)

and from the fact that a transfer of the title from the United States to another owner follows their favorable action, it must result that at some stage or other of the proceedings *their authority in the matter ceases.*

"It is equally clear that this period is, at the latest, precisely when the last act in the series essential to the transfer of the title has been performed. Whenever this takes place the land has ceased to be the land of the Government; or, to speak in technical language, the legal title has passed from the Government and the power of these officers to deal with it has also passed away."

In Moore vs. Robbins (supra) the court says:

"While conceding for the present, to the fullest extent, that when there is a question of contested right between private parties to receive from the United States a patent for any part of the public land, it belongs to the head of the Land Department to decide that question, it is equally clear that *when the patent has been awarded to one of the contestants and has been issued, delivered and accepted, all right to control the title or to decide on the right to the title has passed from the Land Office. Not only has it passed from the Land Office, but it has passed from the Executive Department of the Government.*

A moment's consideration will show that this must, in the nature of things, be so. We are speaking now of a case in which the officers of the Department have acted within the scope of their authority. The offices of register and receiver and commissioner are created mainly for the purpose of supervising the sales of the public lands; and it is a part of their daily business to decide when a party has by purchase, by pre-emption or by any other recognized mode, established a right to receive from the government a title to any part of the public domain. This decision is subject to an appeal to the secretary, if taken in time. But if no such appeal be taken, and

the patent issued under the seal of the United States, and signed by the President, is delivered to and accepted by the party, the title of the government passes with this delivery. *With the title passes away all authority or control of the Executive Department over the land, and over the title which it has conveyed.* * * * But in all this there is no place for the further control of the Executive Department over the title. *The functions of that department necessarily cease when the title has passed from the government. And the title does so pass in every instance, where, under the decisions of the officers having authority in the matter, a conveyance, generally called a patent, has been signed by the President, sealed and delivered to and accepted by the grantee.*"

Then, under the established principles of the law, as shown by the above authorities, at the time that the Land Department issued the patents to these appellants, it conveyed all the interest of the United States, and all the right of the Executive Department of the government to exercise any control or authority over the title or land passed by these grants. There are, therefore, two reasons why the appellee's right to maintain and operate its electric power transmission line over the lands in question was necessarily extinguished:

First, the conveyance of an absolute title to appellants clearly showed an intent on the part of the Land Department to revoke this permit or license, and we think did revoke it, and, second, even if the Land Department did not intend to so extinguish the rights of plaintiff, it placed all control and authority over the lands now belonging to defendants *out of its power when the patents were granted*, and the Executive Department of the gov-

ernment has no interest in the land whatever. *There is nothing belonging to the government left upon which a license or permit by the Land Department can operate,* and the law makes no provision for the operation of a license when the licensor has no interest upon which the license can operate.

It seems self-evident that the grants of the government to appellants had the legal effect of *either revoking the permit of appellee, or else they transferred to appellants the right to revoke it.* Certainly the United States as grantor *reserved no right or power to either revoke* the permit *as to these lands* or to further *regulate* or *control* it over these tracts of land. If the Government cannot revoke it, and the appellants cannot revoke it, then it must have *by some process become a vested right,* and appellee has secured a perpetual right to operate and maintain its lines across a great many miles of land, similarly situated to that of these appellants, *for nothing,* and now alleges that its permanent right under the permit is worth $25,000.00. (Tr. 3.)

What power has the Secretary of the Interior over these lands after the delivery of the patent? *This land is deeded absolutely to the settler.* It has passed beyond the control of the government, and the relative rights of the settlers and the Washington Water Power Company under this patent are now controlled *solely and alone by the law of thte State relative to real estate.*

III.

REGULATION OF THE LAND DEPARTMENT AND

RIGHTS OF APPELLANTS THEREUNDER.

At the time these lands were thrown open to entry in May, 1910, the rules and regulations of the Land Department provided that the issuance of a patent to lands covered by an outstanding permit under this statute revoked the permit. Paragraph 11 of the then governing regulations (31 L. D. 17) provided inter alia:

> *"The final disposal by the United States of any tract traversed by the permitted right of way is of itself, without further act on the part of the Department, a revocation of the permission so far as it affects that tract,* and any permission granted hereunder is also subject to such further and future regulations as may be adopted by the Department."

The foregoing provisions establish the fact that at the time the Coeur d'Alene Indian Reservation was thrown open to settlement the regulations of the Land Department provided that a patent issued to a settler would revoke any permit outstanding on the land under this statute. *This regulation was in effect at the time each of these appellants made homestead entry upon their respective lands.* (Tr. 5, 8, 9, 10.) It was also in effect when Grab made final proof June 24, 1912 (Tr. 9).

The Land Department changed these regulations (41 L. D. 152) in August, 1912, but if it be granted that the Department did have authority or power to change the construction of this statute, which we urge it *did not,* it could not do so in any manner to affect the *rights of these appellants which were initiated and date from the time of their entry of the land in* 1910, when the regu-

lation for cancellation was in effect.

IV.

LAND CEASES TO BE PUBLIC AFTER ENTRY.

Entry by a settler upon public land and the receipt of a certificate of entry from the Land Department instantly segregates such land from the public domain and when patent subsequently issues it takes effect as of the date of such entry.

In the case of Witherspoon vs. Duncan, 4 Wall 210 (18 L. Ed. 339), this court used the following language:

> "In no just sense can lands be said to be *public lands* after they have been entered at the land office and a certificate of entry obtained. If *public lands* before the entry, after it they are *private property.* If subject to sale, the government has no power to revoke the entry and withhold the patent. A second sale, if the first was authorized by law, confers no right on the buyer, and is a void act.
>
> "According to the well-known mode of proceeding at the land offices (established for the mutual convenience of buyer and seller), if the party is entitled by law to enter the land, the receiver gives him a certificate of entry reciting the facts, by means of which, in due time, he receives a patent. The contract of purchase is complete when the certificate of entry is executed and delivered, and *thereafter the land ceases to be a part of the public domain.*"

To the same effect see:

Wirth vs. Branson, 98 U. S. 118, 25 L. Ed. 86.
Cornelius vs. Kissel, 128 U. S. 456, 32 L. Ed. 482.

Clearly under the foregoing authorities, even if the Land Department had the power or authority to *misin-*

terpret the Act of Congress and make such regulations, they would in nowise affect the previously initiated rights of these appellants. Their rights were established in 1910, when they made entry on this land. Any act of the Department subsequent thereto tending to change or alter such rights would be in excess of jurisdiction and void. It would be depriving these appellants of their property without notice or chance to protest. Under the regulation in effect at the date of their entry upon this land appellants had a right to believe that the subsequent issuance of patents to them would revoke the permit of appellee and would give appellants title to all the land which they had purchased free from any servitude of appellee's power line.

This identical question came up before the Land Department in a case wherein appellee was also a party. The case is entitled John A. Nye et al. ,vs. Washington Water Power Co., and the opinion (Defendants' Ex. 5) was written by Secretary Fall. In this opinion the Secretary, after quoting the regulation in effect in 1910, used the following language:

> *"Settlers, or entrymen, were therefore warranted in believing that when they had complied with the law and patent had issued, the prior permit or license granted would terminate as to the lands so patented."*
>
> (D-46785 of April 23, 1921.)

With such regulation in effect when these appellants made their respective homestead entries, and paid for this land, it would violate the well settled principles of

equity and justice to permit the regulation, dated August 24, 1912, to be effective as against them if it should be conceded that the Department under any circumstance had the authority to promulgate such a rule. They are the purchasers of this land and, as Secretary Fall said,

> "were therefore warranted in believing that when they had complied with the law and patent had issued, the prior permit or license granted would terminate as to the lands so patented."

This regulation of 1912, if effective, would deprive them of part of that which they had purchased. This would not seem to be either justice or law.

Upon first impression it might seem that to hold the subsequent conveyance of these lands to appellants revoked appellee's permit would work a hardship upon appellee, in view of the fact that it has expended a certain amount of money in constructing this power line. Upon closer examination, however, such question would seem to be of no consequence and could certainly give appellee no right against these appellants, who are bona fide purchasers of this land from the United States.

V.

MERE OCCUPATION AND IMPROVEMENT OF PUBLIC LAND DOES NOT CONFER A VESTED RIGHT IN THE LAND SO OCCUPIED, SO THAT THE OCCUPANT CAN MAINTAIN A RIGHT OF POSSESSION AGAINST THE UNITED STATES OR THE GRANTEE OF THE UNITED STATES.

In the case of Northern Pacific Railway Co. vs. Smith, 171 U. S. 260; 43 L. Ed. 157, this court had under consideration a question arising out of a settlement upon public land with the view of locating a townsite thereon. The party had already built houses on the particular property, but had made no application to the Land Department. Later the land in question was granted to defendant railroad company. The court in deciding that case used the following language:

> "It has frequently been decided by this court that mere *occupation and improvement* on the public lands, with a view to pre-emption, *do not confer a vested right in the land so occupied;* that the power of Congress over the public lands, as conferred by the constitution, *can only be restrained by the courts in cases where the land has ceased to be government property* by reason of a *right vested in some person or corporation*, that such a vested right, under the pre-emption laws, is only obtained when the purchase money has been paid, and the receipt of the proper land officer given to the purchasers. If then, one seeking to appropriate to himself a portion of the public lands cannot, *no matter how long his occupation or how large his improvements*, maintain a right of possession against the United States or their *grantees*, unless he has by entry and payment of purchase money, *created in himself a vested right*, is one who claims under a townsite grant in any better position?"

In the case of Johnson vs. Drew, 171 U. S. 94; 43 L. Ed. 88, the Supreme Court of the United States said:

> "It being so a part of the *public domain*, subject to the administration by the Land Department and to disposal in the ordinary way, the question arises whether a party *can defend against a patent duly issued therefor upon an entry made in the local land*

office on the ground that he was in actual possession of the land at the time of the issue of the patent? *We are of the opinion that he cannot.* It appears from the testimony that the defendant, *although in occupation of this land*, as he says, from 1871, never attempted to make any entry in the local land office, never took any steps to secure a title, and, in fact, did nothing until after the issue of a patent, when he began to make inquiry as to his supposed rights."

To the same effect see:

Frisbie vs. Whitney, 76 U. S. 187; 19 L. Ed. 668.
Gonzales vs. French, 164 U. S. 339; 41 L. Ed. 458.
Hutchings vs. Low, 82 U. S. 77; 21 L. Ed. 82.
Steel vs. St. Louis Smelting & Refin. Co., 106 U. S. 447; 27 L. Ed. 226.

In the present case appellee does not appear to claim any vested right in this land by means of any grant or conveyance, and there is no showing that it ever took any steps to acquire title to or an easement for this right of way, although it had notice that appellants were purchasing it, and under the above authorities it seems clear that appellee's mere occupancy and construction of its power line across this land *did not give it any right against the United States and does not give it any right against these appellants, who are bona fide purchasers from the United States.*

VI.

NO ESTOPPEL AGAINST GOVERNMENT OR ITS GRANTEE.

The principle that one should be estopped from asserting a right to property upon which he has, by his con-

duct, misled another cannot be invoked against the United States, or by one who, at the time the improvements were made, was acquainted with the true character of his title or with the fact that he had none.

In the case of Steel vs. St. Louis Smelting & Refining Co., 106 U. S. 447; 27 L. Ed. 226, this court had under consideration a case wherein plaintiff had acquired a mineral patent to lands claimed by defendant under a conveyance as part of a townsite on the public domain. Plaintiff set up its title and defendant alleged that the land had been occupied as a townsite for more than 19 years prior to the patent of plaintiff; that the plaintiff's assignor had lived in the town for nineteen years and was cognizant of the fact that large amounts of money had been expended by defendant and was being expended by defendant, amounting to over $5,000.00, and had never made any objection thereto nor informed defendant of his rights. Demurrer to this answer was sustained by the lower court, and in considering the question this court said:

> "These allegations are very far from establishing such an equity in the defendants as to estop the patentee and those claiming under him, from asserting the legal title to the premises. These matters *could not operate to estop the government in any disposition of the land* it might choose to make. Its power of alienation could not be affected until the defendants had performed all the acts required by law to acquire a *vested interest in the land*, and it is not pretended that they took any steps to secure such an interest. Whatever right, therefore, the government possessed, to use or dispose of the property, freed from any claim of the defendants, it could

pass on to its grantee.

"The principle invoked is that one should be estopped from asserting a right to property upon which he has, by his conduct, misled another, who supposed himself to be the owner, to make expenditures. It is often applied where one owning an estate, stands by and sees another erect improvements on it, in the belief that he has the title or an interest in it, and does not interfere to prevent the work, or inform the party of his own title. There is in such conduct a manifest intention to deceive, or such gross negligence as to amount to constructive fraud. The owner, therefore, in such a case, will not be permitted afterwards to assert his title and recover the property, at least without making compensation for the improvements. *But this salutary principle cannot be invoked by one who, at the time the improvements were made, was acquainted with the true character of his own title or with the fact that he had none.*"

See also:

Henshaw vs. Bissell, 85 U. S. 255; 21 L. Ed. 835.
Brant vs. The Virginia Coal & Iron Co., 93 U. S. 326; 23 L. Ed. 927.

In this case there is not a scintilla of showing that would even tend to establish estoppel. Appellee knew at the time it was constructing its line over this land that it did not have any interest therein and *it further knew that a subsequent patent to such land would cut off the permit* under which it was operating. The regulations of the Department there in force so advised it. (Par. 11, at p. 17 of 31 L. D.) With knowledge of these facts it went ahead and built its line.

VII.

ASSUMPTION OF LOWER COURT ERRONEOUS.

As it appears to us, the lower court committed the basic error of assuming that notwithstanding the act of Congress, the appellee acquired some kind of *title or interest* in this land when the Secretary gave it a *permit* to build its line across the Indian Reservation (Reported in 281 Fed. 900). The court predicated its consideration of the case upon the statement: "The Government could not grant, by patent or otherwise, what it did not own, nor anything more than it owned." This principle is axiomatic and yet its statement in this connection could have no place except upon the assumption that the Government had *previous to issuance of patent sold, granted or in some way transferred* to appellee a *right of way over this land.* The Secretary acquired only such authority over the land as Congress had conferred upon him. On the other hand, Congress had *instructed him, and all persons dealing with him,* by the very parting admonition of the act (Act February 15, 1901), that any permit he might give "*shall not be held to confer any right or easement or interest in, to or over any public land, reservation or park.*" What other or more direct language could Congress have used than it did use to preclude all notion or possibility of any kind of *property interest in, to or over* the land passing from the Government by a permit? The intent of Congress appears clear beyond doubt. The words "*right* or *easement* or interest" cover all the property rights that can exist in real estate, and the words "*in, to* or *over*" cover *all manner* and *form of interest, right of possession* or property right. Something else must be read into this Act in order to give a

permittee an interest *in, to* or *over* the land. Now if the Washington Water Power Company, at the time appellants made their entry and later secured their patent, did not have "*any right or easement or interest in*" this land and did not have any "*right to or over*" this land, *then what was it that appellee had* that the *government could not grant* or convey by patent? *This pertinent legal inquiry cannot be answered by the mere statement of the axiom that a grantor cannot grant any more than he owns.* Pursuing the foregoing assumption the court further said:

> "It owned the fee of the lands upon and over which the appellee's plant was constructed and was being operated, subject to the terms and conditions expressly declared in the statute and the regulations of the Interior Department under and pursuant to which such plant was constructed and was being operated, of which record evidence all parties, including the appellants, settlers and patentees, had full notice. The permission granted to the appellee was subject to revocation at any time by the then Secretary of the Interior or his successor; but that was the sole condition to the continuous existence of the rights of way granted, and that reserved power on the part of the grantor was never exercised prior to the issuance of the patents to the appellants, nor since, so far as appears. Whether the rights of way could be revoked by the present or any other successor of the then Secretary is not for consideration in the present case."

The patents which issued to appellants conveyed to them the *unqualified fee* in the lands without any reservations of any kind. Now it seems from the opinion of the Court of Appeals that notwithstanding the unqualified terms of the patents themselves the title they convey

is limited and the lands thus granted are, nevertheless, burdened with a continuing *servitude.* The holding of the lower court at once raises the inevitable and legitimate inquiry: If this so-called permit or license remained in force *after* the patent was issued, *in whom remained the power to revoke it? Was it left in the Secretary or transferred* with the patent *to the patentee?* If the issuance of this unqaulified patent did not either *revoke the permit* or transfer the power to do so to the grantee then certainly the holder of the Secretary's permit had in some way acquired some "*right, easement* or *interest*" in these lands contrary to the express will of congress.

The trial court rested his decision in this case upon a previous decision by the same court rendered in the case of Washington Water Power Co. vs. Harbaugh, 253 Fed. 681. In that case it will be seen that the court invoked the doctrine of estoppel against Harbaugh, the patentee of the government. The court there said:

> "It is hardly possible to contend that the defendant was *in any wise misled to his injury.* Admittedly he knew that the plaintiff was maintaining and operating the transmission line, and *so far as appears* he was willing to purchase the property subject to such right as it then had. When he made his offer he had no assurance or intimation that a patent would be issued without a notation referring to the right of way. Accordingly it is held that *neither the integrity nor the extent of the plaintiff's right* was affected by the issuance of the patent."

Was it not just as reasonable, and more in keeping with the established rules of law and practice for the

homesteader to suppose that after advertising to prove up on his homestead any one who claimed a superior or adverse right in the land would appear and make his protest and that any mere *revocable license* held by any one would be terminated upon the issuance of patent? *Why* should the homesteader suppose or have reason to believe for a moment that the *uniform and well established* rule or law *that a conveyance of the fee* title revokes a license would or could be set aside or disregarded in his case? Can any one truly say that the homesteader would have taken this tract of land had he been apprised that this *license* would be construed to be in *effect an easement?* *Why* should the homesteader suppose for a moment that any reservations not directed or required by law would be made in his patent? And if none was made, why should he suppose the omission was a *mistake* or an inadvertence? The trial court, in effect, corrected these patents in a collateral proceeding to make them read as if a reservation had been made therein of appellee's permit.

VIII.

APPELLEE'S TELEPHONE LINE.

What has been said relative to appellee's power transmission line applies with equal force to its telephone line. While appellee claims the right to operate and maintain this telephone line pursuant to a permit or grant under the prosivions of the Act of March 3, 1901 (31 Stat, at Large 1083), an examination of this act clearly shows that appellee could not acquire the

right asserted here under said act and that the Secretary of the Interior *was without jurisdiction or authority* to issue or grant such right *in view of the facts that existed.* In the first place, it is conceded that this application was made and the telephone line constructed and is maintained for *appellee's use only,* and that the same is in *no sense maintained for the benefit of the public at large* and is used only as an accessory or incident to appellee's *power transmission line.* The Act of March 3, 1901 (31 Stat. at Large 1083) applies only to telephone lines operated *for the use and benefit of the public at large,* where the company operating the same is doing so *as a business and charges tolls* and not for its own private use as an accessory to some other business. This is shown from the wording of the Statute itself. The portion of the Statute pertinent reads as follows:

> "The Secretary of the Interior is hereby authorized and empowered to grant a right of way, in the nature of an easement, for the construction, operation and maintenance of telephone and telegraph lines and *offices for general telephone and telegraph business* through any Indian Reservation * * * *and Congress hereby expressly reserves the right to regulate the tolls or charges for the transmission of messages* over any lines constructed under the provisions of this Act."

The above quoted language is so clear as to the purpose of the law that further discussion seems unnecessary. In view of the foregoing provisions of the act it seems clear that the appellee could not and did not acquire any right under the Act of March 3, 1901 (31 St. at Large 1083) and that the so-called grant for a right of way for

a telephone line was wholly ineffective and void.

It would appear, therefore, that if appellee is authorized to operate and maintain this telephone line at all, it must do so under the permit granted pursuant to the Act of February 15, 1901, for its right of way for the power transmission line and as an accessory to such transmission line, and the right of way for the telephone line must stand or fall with the permit for the power transmission line.

IX.

APPELLEE SHOULD PAY JUST COMPENSATION FOR EASEMENT.

Some stress has been laid upon the contention that the Washington Water Power Company, and other similar corporations, have constructed expensive plants and made heavy investments in constructing their transmission lines over public lands, and that to now hold that the subsequent conveyance of these lands revokes the permit or license to maintain such transmission lines would work a hardship upon the companies making such investments. That contention is wholly without merit and, we believe, unworthy of consideration in this case. Since, however, it has been stressed both upon the argument of this case in the lower court and by the opinion of the Circuit Court of Appeals we should, perhaps, give it some consideration here. Appellee has never paid anything for a right of way or easement for its transmission line through the Coeur d'Alene Indian Reservation or

over the lands of appellants. Notwithstanding that fact, it has had the use of this right of way, which it values at more than $30,000 (Tr. 3), for more than twenty years. It is a public service corporation under the laws of the state of Idaho (Sec. 2396 Idaho C. S.), and in fixing rates which it charges to consumers and the public it undoubtedly places a valuation upon its easements and right of way and is allowed to collect rates thereon (Murray vs. Pub. U. Comm., 27 Idaho 603). It is manifestly unjust to allow this public utility a free easement and right of way on which it may collect rates, while its competitor, which comes in after these lands have passed into *private ownership*, will be obliged to purchase or condemn an easement and right of way and pay a just compensation therefor as provided by the Constitution and laws of Idaho. It is also manifest that appellee had notice at the time it procured its *permit* and thereafter constructed its works and transmission line that the Act of February 15, 1901, prohibited it from acquiring *"any right or easement or interest in, to or over any public land"* through which it might construct its line under such permit. Such companies as appellee are not taken unawares, but make their investments with their eyes open and in the full knowledge of the law. What the Washington Water Power Company is now seeking to avoid is the purchase or condemnation of its easement and right of way across these privately owned lands and pay just compensation therefor as provided by the Constitution and Statutes of the State of Idaho (Idaho Const. Sec. 14, Art. 1; Compiled Statutes of Idaho, Sec. 7404, subd. 6; Hollister vs.

State, 9 Ida. 8).

We believe we are safe in saying that every state in the Union in which a permit has been granted by the Secretary under the provisions of the Act of February 16, 1901, has either a constitutional or statutory provision authorizing the acquisition of easements and rights of way for electric power and light transmission lines under the power of eminent domain. So we repeat, that *appellee has no cause to complain if it finds itself under the necessity of actually purchasing, and paying for, its easement and right of way or condemning it under the eminent domain statute.* It will then be doing only what the law requires its competitors and all other public service corporations to do. It will be paying for the property it has thus far enjoyed as a public gratuity.

We most respectfully submit that the judgment of the Trial Court and the decision of the Circuit Court of Appeals should be reversed and the cause should be remanded with instructions to the lower court to dismiss appellee's actions and that appellants recover their costs.

Respectfully submitted,

JAMES F. AILSHIE,

Attorney and Solicitor for Appellants.

Coeur d'Alene, Idaho.

Ross, Circuit Judge, after stating the case.

Not only did the appellants at the time that they settled upon their respective tracts of land have actual notice of the existence and operation of the appellee's transmission and telephone lines and incidental patrol road, but they are properly chargeable with actual knowledge of the law under and by authority of which those lines were constructed and were being operated, and of the right of the appellee to continue to operate them until the permission to do so should be revoked by the Secretary of the Interior; for the statute, as will be seen, in terms so declares. It expressly provides that the power conferred upon the Secretary should be exercised "under general regulations to be fixed by him," of which latter the appellants must be held to have had notice. And the statute itself declares that any permission given by the Secretary under the provisions of the act "may be revoked by him or his successor in his discretion, and shall not be held to confer any right or easement or interest in, to or over any public land, reservation or park."

The question, therefore, we have to decide is whether the permits under which the appellee constructed and for years maintained its costly plant, were legally terminated by the issuance of the government's patents to the appellants.

It is conceded—or seems to be conceded, by counsel for the appellants that had the patents in terms excepted the permits that had been theretofore granted by the Secretary of the Interior in pursuance of the Act of Congress that has been referred to, the previously existing rights of the appellee would not have been affected.

The government could not grant, by patent or otherwise, what it did not own, nor anything more than it owned. It owned the fee of the lands upon and over which the appellee's plant was constructed and was being operated subject to the terms and conditions expressly declared in the statute and the regulations of the Interior Department under and pursuant to which such plant was constructed and was being operated, of which record evidence all parties, including the appellants, set-

tlers and patentees, had full notice. The permission granted to the appellee was subject to revocation at any time by the then Secretary of the Interior or his successor; but that was the sole condition to the continuous existence of the rights of way granted, and that reserved power on the part of the grantor was never exercised prior to the issuance of the patents to the appellants, nor since, so far as appears. Whether the rights of way could be revoked by the present or any other successor of the then Secretary is not for consideration in the present case.

We see no force in the contention of counsel for the appellants that the grants of rights of way to the appellee were mere licenses. The Espediente which formed the basis of the claim in De Haro vs. United States, 5 Wall. 599, was, as held by the Supreme Court (pp. 622 et seq.) nothing more, nor was it intended to be anything more, than a permit to pasture certain land temporarily until the ejidos were measured—in other words, a mere permissive temporary occupation of land for grazing purposes, which the Supreme Court said in its opinion (p. 627) "the Governor was willing should be in writing instead of by parol, to enable the licensees to enjoy their possession with greater security. And this leads us to the consideration of the law on the subject of licenses." The court then proceeded to declare the law, saying:

"There is a clear distinction between the effect of a license to enter lands, uncoupled with an interest, and a grant. A grant passes some estate of greater or less degree, must be in writing, and is irrevocable, unless it contains words of revocation; whereas a license is a personal privilege, can be conferred by parol or in writing, conveys no estate or interest, and is revocable at the pleasure of the party making it. There are also other incidents attaching to a license. It is an authority to do a lawful act, which, without it, would be unlawful, and while it remains unrevoked is a justification for the acts which it authorizes to be done. It ceases with the death of either party, and cannot be transferred or alienated by the licensee, because it is a personal matter, and is limited to the original parties to it. A sale of the lands by the owner instantly works its revocation, and in no

sense is it property descendible to heirs. These are familiar and well established principles of law, hardly requiring a citation of authorities for their vindication; but if they are needed, they will be found collected in the notes to 2d Hare & Wallace's American Leading Cases, commencing on page 376. We are not aware of any difference between the civil and common law on this subject."

It would hardly be contended that the appellee could not have at any time transferred or conveyed its power and telephone lines with all incidental rights pertaining thereto to someother company or person, or that its rights in the premises would have passed to its creditors in the event it had been unsuccessful in its business.

We see no merit in the appeal, and, accordingly, the decree is affirmed.

Endorsed: OPINION filed July 3, 1922. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.